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No. 859

In the

Supreme Court of the United States

OCTOBER TERM, 1970

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE,
Petitioner,

v.

HARRY H. PRICE & SON, INC., et al,
Respondent.

On Petition for Writ of Certiorari to The United States Court of Appeals for The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The United States Court of Appeals for the Fifth Circuit correctly decided that Respondent had standing to maintain its suit in the United States District Court, Northern Division of Texas, at Dallas, Texas.

ARGUMENT

The issue in the present case is whether under the Agricultural Marketing Agreement Act of 1937 the only per-

sons entitled to attack the orders of the Secretary of Agriculture are handlers as defined by the Act. Petitioner asserts that because businesses such as Respondent's are not included in the Act, therefore, Respondent has no remedy. This argument is contrary to the reported decisions of this Court in *Barlow v. Collins*, 25 L. Ed. 2d 192, 397 U.S. 150, and *Association of Data Processing Service Organization, Inc. v. Camp*, 25 L. Ed. 2d 184, 397 U.S. 159. Justice Douglas in the *Data Processing* case stated:

> "Generalizations about standing to sue are largely worthless as such. One generalization is, however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies.' As we recently stated in Flast v. Cohen, 392 U.S. 83, 101, 20 L. Ed. 2d 947, 962, 88 S. Ct. 1942, '* * * (i)n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' Flast was a taxpayer's suit. The present is a competitor's suit. And while the two have the same Article III starting point, they do not necessarily track one another."

The plaintiff alleged that the challenged action had caused it injury. The *Administrative Procedure Act*, 80 Stat. 392, 5 U.S.C. 702, grants standing to a person "aggrieved by agency action." The petitioner in the *Data Processing* case was not mentioned in the Comptroller's Manual for National Banks (#3500) October 15, 1966 ed. Petitioners were competitors of Banks. See also *Chicago v. Atchison, T. & S. R.*, 357 U.S. 77, 2 L. Ed. 2d 1174. In *Hardin v. Kentucky Util-*

ities Co., 390 U.S. 1, 19 L. Ed. 2d 787, involving the TVA Act, this Court held no explicit statutory provisions were necessary to confer standing. The Agricultural Marketing Agreement Act does not preclude Respondent from suing. *Stark v. Wickard*, 321 U.S. 288, 88 L. Ed. 733 and 80 Stat. 392, 5 U.S.C. § 701 (a). The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold such review. No presumption exists against judicial review and in favor of administrative absolutism. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 18 L. Ed. 2d 681.

In the *Barlow* case, tenant farmers used the Secretary of Agriculture and others to challenge the validity of the Secretary's amended regulation permitting participants in the cotton program to assign payments thereunder to secure the payment of cash rent for farmlands. The Fifth Circuit in such case, among other grounds, stated in its opinion that the tenant farmers lacked standing to challenge the administrative regulations because there was no statutory provision expressly or impliedly giving them such authority. This is what petitioner is saying here. This Court in the *Barlow* case expressly holds against such contention. It says:

> "Indeed, judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated."

See *Abbott Laboratories v. Gardner*. There certainly is no clear and convincing evidence of such legislative intent.

So, in the cases cited and discussed above, this Court has made it clear that standing for purposes of judicial re-

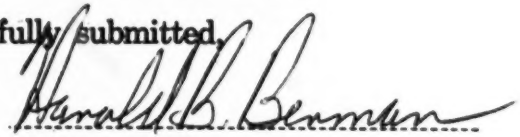
view need not flow from and express Congressional grant. Standing to challenge administrative action was found to turn on a flexible, liberalized formula in which two conditions are central: (1) whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise and (2) whether the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. In fact, Mr. Justice Brennan's concurring opinion in the *Data Processing* case simplifies the test on the dependence of an allegation of injury in fact. In the *Rosado v. Wyman*, 397 U.S. 397, 25 L. Ed. 2d 442, this Court upheld the right of recipients of welfare to review an order of HEW where no such right was given by Statute.

The Court of Appeals, Fifth Circuit, in 425 F. 2d 1137, correctly determined that Respondent had standing to sue.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,



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